

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT
DECISION NO. 5844 AS A PRECEDENT
DECISION PURSUANT TO SECTION
409 OF THE UNEMPLOYMENT
INSURANCE CODE.

In the Matter of:

ALLEN C. PIERCE
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-218

FORMERLY BENEFIT DECISION No. 5844

S.S.A. No.

DOUGLAS AIRCRAFT COMPANY, INC.
(Appellant-Employer)

The above-named employer appealed from the decision of a Referee (LA-44806) which held that the claimant was not subject to disqualification under subdivisions (1) or (2) of Section 58(a) of the Unemployment Insurance Act (now section 1256 of the Unemployment Insurance Code). On November 2, 1951, this Appeals Board remanded the matter to a Referee for further hearing which was held November 27, 1951, in Long Beach.

Based on the record before us, our statement of fact, reason for decision, and decision are as follows:

STATEMENT OF FACT

The claimant was last employed by the appellant as an instrument mechanic from July 28, 1948, until June 15, 1951, when his employment ended under circumstances hereinafter set forth.

On March 27, 1951, the claimant established a benefit year under the disability provisions of the Act and on July 10, 1951, he registered for work and filed his claim for unemployment insurance benefits in the Long Beach office of the Department. The appellant

protested the payment of benefits and on July 24, 1951, the Department determined that the claimant was subject to disqualification under the provisions of Section 58(a)(2) of the Act (now section 1256 of the code). The claimant appealed and a Referee reversed the determination.

On March 15, 1951, the claimant had a dispute with his leadman during which it is alleged he used abusive and profane language and threatened the latter with bodily harm. As a result of this incident the claimant was warned that a repetition would lead to discharge and he was transferred to another department.

The claimant's supervisor did not appear at either hearing in this matter. A representative of the appellant testified that the supervisor had heard from other individuals that on two occasions between June 1 and June 14, 1951, the claimant had addressed abusive and profane language to fellow employees. The claimant has denied these allegations.

On June 15, 1951, the claimant was unable to respond immediately to the request of a woman employee for certain supplies. The claimant concluded that this employee had lodged an improper protest with her superior because the latter also spoke to him about the matter. For this reason, later in the day, when he happened to see the woman employee, he made the following remark, "Some people sure are asinine." A complaint was made to the claimant's supervisor about this incident, and he called the claimant to one side, charged him with using abusive and profane language, despite the claimant's denial, and gave the claimant the option of resigning his position or being discharged. The claimant chose to resign.

The original notice of hearing before the Referee addressed to the employer contained the following statement:

"Persons interested in this matter must be present at the time and place set for hearing with witnesses, if any, and all evidence that has a bearing on this claim, including pay records, books, receipts, and other pertinent material."

At the second hearing held on November 27, 1951, the employer was advised by the Referee that it was within the employer's discretion to introduce any evidence that it desired.

REASON FOR DECISION

Section 58 of the Unemployment Insurance Act (now section 1256 of the code) reads in part as follows:

"(a) An individual shall be disqualified for benefits if:

"(1) He has left his most recent work voluntarily without good cause, . . .

"(2) He has been discharged for misconduct connected with his most recent work."

In Benefit Decision No. 5193, we expressed the following opinion:

". . . The claimant did not voluntarily leave his employment despite the fact that he submitted his resignation. It is apparent that the employer left the claimant with no alternative but to resign since it was made clear to him that he would be immediately discharged if he did not comply with the employer's request."

Similarly, in the present case, the claimant's forced resignation was in no sense voluntary. If he had not resigned, he would have been discharged. Having had no real voluntary choice in the matter of continuing his employment, we hold that he was discharged by his employer and that only Section 58(a)(2) of the Act (now section 1256 of the code) is applicable to this case (Benefit Decision No. 5452).

We have consistently defined misconduct within the meaning of Section 58(a)(2) of the Act (now section 1256 of the code) as "conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such

degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertence or ordinary negligence in isolated instances or good faith errors in judgement or discretion are not to be deemed 'misconduct' within the meaning of the statute." (Benefit Decisions Nos. 4648 and 5566).

In the present case the only evidence adduced by the employer tending to prove that the claimant during the two weeks prior to his termination used abusive and profane language to fellow employees was the hearsay testimony of its representative at the hearing that the claimant's supervisor had heard from other individuals that on two occasions during that period the claimant had addressed abusive and profane language to fellow employees. The claimant denied under oath at the hearing before the Referee that he had used any abusive or profane language to fellow employees during this period.

In Benefit Decision No. 5103 the employer contended that the claimant was discharged for misconduct in that he had been insubordinate in making certain remarks calculated to induce fellow employees to violate company regulations. The only evidence adduced by the employer that the claimant made the remarks attributed to him was hearsay by a company official and the claimant denied under oath that he had made the remarks. The notice of hearing before the Referee to the employer was identical to that in the present case. In concluding that the claimant was not discharged for misconduct, we stated:

" . . . The basic reason (for discharging the claimant), as stated by the company representative, was that the claimant was allegedly guilty of insubordination, by making certain remarks calculated to induce fellow employees to violate company regulations. The claimant has denied the remarks attributed to him. If the remarks were made, it was within the power of the appellant-employer to introduce the testimony of those

witnesses who allegedly heard the remarks made. The appellant-employer was notified in advance of the hearing that such evidence would be required, but failed to produce it, and in appealing to this Appeals Board, has submitted no valid excuse for such failure. Since the fact of such insubordination was not established by a preponderance of the evidence, we hold that the claimant was not discharged for misconduct within the meaning of Section 58(a)(2) of the Act [now section 1256 of the code]."

Applying the principle of Benefit Decision No. 5103 to the present case, it is our opinion that the record does not support a finding that the claimant in fact used abusive and profane language to fellow employees as contended by the employer. The remark which was the immediate cause of his discharge did not go beyond the usual give and take between employees in an industrial establishment. As such, it did not show a wilful or wanton disregard of the appellant's interest nor an intentional and substantial disregard of the claimant's duties and obligations to his employer. Accordingly, we conclude that the claimant was not discharged for misconduct within the meaning of Section 58(a)(2) of the Act (now section 1256 of the code).

DECISION

The decision of the Referee is affirmed. Benefits are payable as provided in the decision of the Referee.

Sacramento, California, January 11, 1952.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

MICHAEL B. KUNZ, Chairman

GLENN V. WALLS

EDWARD CAIN

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 5844 is hereby designated as Precedent Decision No. P-B-218.

Sacramento, California, February 5, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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